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Ninth report on reservations to treaties*

By Mr. Alain Pellet, Special Rapporteur

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* *Note*: For technical reasons it was necessary to submit this document as the ninth report on reservations to treaties; in reality, it is a corrigendum to the second part of the eighth report (A/CN.4/535/Add.1), whose plan was as follows:

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1. "Generic" object of objections to reservations (revision) – additional note

1. At its fifty-fifth session, the Commission considered chapter II of the eighth report on reservations to treaties concerning the definition of objections to reservations.[1] During that consideration, the definition of objections to reservations elicited some rather sharp criticism on the part of several members of the Commission. The Special Rapporteur was sympathetic to that criticism, suggesting that he should change fairly radically the definition of objections proposed initially and undertaking to submit a modified version of the definition. The Commission therefore decided to postpone the discussion of draft guidelines 2.6.1, 2.6.1 bis and 2.6.1 ter on the definition of objections until its fifty-sixth session.[2] This additional note is submitted in the light of that decision.

(a) Initial proposals of the Special Rapporteur

2. Following a somewhat detailed presentation of State practice with respect to objections to reservations, the Special Rapporteur proposed the following definition:

> 2.6.1 *Definition of objections to reservations*
>
> "Objection" means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the State or organization purports to prevent the application of the provisions of the treaty to which the reservation relates, or of the treaty as a whole with respect to certain specific aspects, between the author of the reservation and the State or organization which formulated the objection, to the extent of the reservation, or to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection.

3. This definition seemed to him justified by the following considerations, which were set forth in paragraphs 82 to 100 of the eighth report:

- For reasons of legal security, it seems essential to determine whether a response to a reservation is an objection or a mere comment; as the French-British court of arbitration stated in the *Mer d'Iroise* case concerning the delimitation of the continental shelf:

> "Whether any such reaction amounts to a mere comment, a mere reserving of position, a rejection merely of the particular reservation or a wholesale rejection of any mutual relations with the reserving State under the treaty consequently depends on the intention of the State concerned";[3]

- States often use vague terms whose ambiguity veils their true intentions,[4] which would seem to indicate that the definition of objections should be treated in the same way as the definition of the reservations themselves and that an objection may be regarded as such even if it is not expressly presented as an objection by the author of a unilateral statement reacting to a reservation;

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[1] From its 2780th to its 2783rd meetings (on 25, 29, 30 and 31 July 2003); see A/CN.4/SR.2780-2783.

[2] See A/CN.4/SR.2783, p. 16 of the provisional English version. The Special Rapporteur regrets that as of now the French translation of this summary record is still not available.

[3] *Reports of International Arbitral Awards*, vol. XVIII, pp. 32-33, para. 39.

[4] See the examples given in paras. 84 to 90 of document A/CN.4/535/Add.1.

– Continuing in this direction, the Special Rapporteur saw fit to define objections to reservations according to the effects intended by their author, just as reservations are defined according to the aim of the formulating State or international organization.

4. Moreover, in view of the terminology chosen for draft guidelines 2.3.1 and 2.3.2 concerning reactions to the late formulation of a reservation,[5] the Special Rapporteur suggested the adoption, as appropriate, of a draft guideline 2.6.1 bis worded as follows:[6]

2.6.1 bis *Objection to late formulation of a reservation*

"Objection" may also mean a unilateral statement whereby a State or an international organization opposes the late formulation of a reservation.

5. Lastly, while stating that there could be no question, in this section of the Guide to Practice, of anticipating problems relating to the validity of reservations, the Special Rapporteur considered that it might be useful to have a draft guideline 2.6.1 ter which would spell out the object of objections:[7]

2.6.1 ter *Object of objections*

When it does not seek to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection, an objection purports to prevent the application of the provisions of the treaty to which the reservation relates, or of the treaty as a whole with respect to certain specific aspects, between the author of the reservation and the State or organization which has formulated the objection, to the extent of the reservation.

(b) Discussion of the definition of objections to reservations

6. During the discussion in the plenary Commission, the proposals summarized above concerning the definition of objections elicited some fairly sharp criticism on the part of several members of the Commission.[8] Similar positions were adopted during the discussion in the Sixth Committee;[9] what is more, Poland sent to the

[5] Both draft guidelines use (improperly, in the opinion of the Special Rapporteur) the word "objection" to designate the opposition of a State to such a formulation.

[6] See document A/CN.4/535/Add.1, para. 101.

[7] See ibid., para. 104. Another possibility would have been to include this information in the definition of the objections themselves; draft guideline 2.6.1 would then read as follows: "Objection" means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the State or organization purports to prevent the application of the provisions of the treaty to which the reservation relates, or of the treaty as a whole with respect to certain specific aspects, between the author of the reservation and the State or organization which formulated the objection, to the extent of the reservation, or to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection" (ibid., para. 105).

[8] Other members, however, approved the definition proposed by the Special Rapporteur; see, for example, A/CN.4/SR.2781, p. 19, Ms. Xue (see also A/CN.4/SR.2783, p. 15); A/CN.4/SR.2782, p. 17, Mr. Pambou-Tchivounda; p. 21, Mr. Kemicha (see also A/CN.4/SR.2783, p. 15); see also ibid., p. 11, Mr. Fomba; p. 17, Mr. Rodríguez Cedeño; p. 25, Mr. Daoudi; see also the statements of Slovenia (A/C.6/58/SR.19, para. 4), China (ibid., para. 45) or Malaysia (A/C.6/58/SR.20, para. 20) in the Sixth Committee.

[9] See the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-eighth session, prepared by the Secretariat (A/CN.4/537, paras. 177-192).

Office of Legal Affairs a communication regarding, among other things, draft guideline 2.6.1 which reflects some of these concerns.[10]

7. In general, speakers supported the idea that the intention of the objecting States or international organizations must be determined.[11] But the appropriateness of bringing the definition of objections into line with the definition of the reservations themselves was challenged, at least to the extent that it resulted in the effect (or effects) intended by the objecting State or international organization being limited to those envisaged by article 20, paragraph 4 (b), and article 21, paragraph 3, of the Vienna Conventions on the Law of Treaties by emphasizing (correctly, in the view of the Special Rapporteur) the fact that the definition of objections should be distinguished from the question of their validity.[12]

8. It was pointed out in this respect that the legal effects attributed to objections by the Vienna Conventions were uncertain[13] and were at times difficult to distinguish from those of an acceptance.[14] Moreover, "the aim pursued by [the objecting State] and the legal effects attributed by the [Vienna] Convention ... did not have to be identical".[15] As was apparent from the report itself,[16] the author of an objection might intend to produce effects that were different from those envisaged in the Conventions,[17] in particular the applicability of the treaty as a whole without account being taken of the reservation ("super-maximum" effect).[18] It would therefore be appropriate to have a less restrictive and more flexible definition than the one contemplated in the report.[19]

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[10] Note of 21 April 2004 from the Permanent Representative of Poland to the United Nations addressed to the Director a.i., Office of Legal Affairs.

[11] See, in particular, A/CN.4/SR.2781, p. 13, Mr. Melescanu; p. 18, Ms. Xue; and the statements of France (A/C.6/58/SR.19, para. 40), Japan (ibid., paras. 48 and 49), Greece (ibid., para. 51), Argentina (ibid., para. 88), Australia (A/C.6/58/SR.20, para. 16) or Sweden on behalf of the Nordic countries (ibid., para. 26) during the discussion in the Sixth Committee; see, however, A/CN.4/SR.2782, p. 15, Mr. Pambou-Tchivounda, who distinguishes between the intention of the author of the unilateral statement and the object.

[12] See, in particular, ibid., pp. 14 to 15, Mr. Koskeniemi.

[13] A/CN.4/SR.2780, p. 12, Mr. Gaja; A/CN.4/SR.2781, p. 8, Mr. Koskeniemi.

[14] A/CN.4/SR.2780, p. 12, Mr. Gaja.

[15] Ibid., Mr. Gaja.

[16] A/CN.4/535/Add.1, paras. 95 and 96.

[17] A/CN.4/SR.2780, pp. 12-13, Mr. Gaja; A/CN.4/SR.2781, pp. 3-5, Mr. Kolodkin; A/CN.4/SR.2782, p. 22, Mr. Mansfield; see also the aforementioned communication of Poland (footnote 10) and the statements of Israel (A/C.6/58/SR.17, para. 45), Greece (A/C.6/58/SR.19, para. 51), the Netherlands (A/C.6/58/SR.20, para. 21) and Sweden (ibid., para. 25) in the Sixth Committee.

[18] A/CN.4/SR.2781, pp. 8-10, Mr. Koskeniemi; see also p. 15, Mr. Momtaz. In its aforementioned communication (footnote 10), Poland pointed out that the treaty itself can cause an objection to have a "super-maximum" effect and that such is the case when it provides that reservations must be accepted unanimously by the contracting parties. In the opinion of the Special Rapporteur, this is merely an instance of the "maximum" effect, as envisaged in article 20, para. 4 (b), and article 21, para. 3.

[19] A/CN.4/SR.2781, p. 5, Mr. Kolodkin; p. 7, Ms. Escarameia; p. 7, Mr. Koskeniemi; A/CN.4/SR.2782, p. 23, Mr. Kateka; see also the aforementioned communication of Poland (footnote 10) and the statements supporting this view by the Netherlands (A/C.6/58/SR.19, para. 21), the United States of America (A/C.6/58/SR.20, para. 9), Bulgaria (ibid., para. 63) during the discussion in the Sixth Committee; see, however, the caveats regarding too broad a definition from Mr. Galicki, A/CN.4/SR.2782, p. 5 and France during the discussion in the Sixth Committee (A/C.6/58/SR.19, para. 41).

9. On the other hand, the position of the Special Rapporteur, who considered that the potential authors of an objection could not be limited to the contracting States or international organizations alone,[20] was generally supported by members who spoke on this point;[21] but it was suggested that the wording should be based on article 23, paragraph 1, of the Vienna Conventions, where mention is also made of "other States and international organizations entitled to become parties to the treaty",[22] or to include the signatories.[23]

10. Draft guideline 2.6.1 bis met with general approval,[24] although it was observed that "objections" to the late formulation of a reservation could be included in the general category if a broad definition was adopted.[25]

11. Likewise, members who spoke on draft guideline 2.6.1 ter were in favour of its inclusion in the Guide to Practice,[26] on the understanding that its wording would necessarily be adapted to changes made in draft guideline 2.6.1.

(c) Proposed new definition

12. As he indicated in the discussion in the plenary Commission in 2003,[27] the Special Rapporteur was sympathetic to some of the criticism of the wording of draft guideline 2.6.1 as initially proposed.[28]

13. It seemed to him that two principles must be accepted and taken as starting points for the definition of objections:

- The necessity of not calling into question the rules in the Vienna Conventions, in keeping with the Commission's constant position, which from the outset of its work on the topic had firmly followed this course,[29] to the consistent approval of the vast majority of the States in the Sixth Committee of the General Assembly;
- The need to take into consideration the intention of the objecting State or international organization, whose unilateral statement in reaction to a reservation must purport "to oppose" (to use a neutral and general term) the reservation's having the full effects sought by its author.

14. On the other hand — and this is no doubt the crux of the matter — the Special Rapporteur willingly agrees that he lacked rigour in his choice of wording, which does not include in the *definition* of objections the unilateral statements purporting to produce effects not provided for in the Vienna Conventions. This amounts to prejudging their (in)validity, although, in keeping with his consistent position (a position which some members of the Commission have often been reluctant to

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[20] A/CN.4/535/Add.1, para. 100.
[21] A/CN.4/SR.2782, p. 10, Mr. Fomba.
[22] Cf. A/CN.4/SR.2780, pp. 13-14, Mr. Gaja; see also the aforementioned communication of Poland (footnote 10).
[23] A/CN.4/SR.2781, p. 15, Mr. Momtaz; p. 18, Ms. Xue.
[24] Cf. A/CN.4/SR.2781, p. 7, Ms. Escarameia; p. 18, Ms. Xue; A/CN.4/SR.2782, p. 4, Mr. Galicki; p. 10, Mr. Fomba; see, however, p. 19, Mr. Chee.
[25] Ibid., pp. 10-11, Mr. Koskeniemi; see also A/C.6/58/SR.19, para. 31 (Italy).
[26] Cf. A/CN.4/SR.2780, p. 11, Mr. Gaja; A/CN.4/SR.2782, p. 11, Mr. Fomba.
[27] See A/CN.4/SR.2783, pp. 7-8.
[28] See para. 2 above.
[29] Cf. *Yearbook ... 1995*, vol. II (Part Two), para. 487.

support), the definitions (of reservations or objections) should not anticipate problems of "validity" (or "permissibility").

15. Following the extremely interesting discussion in 2003, the Special Rapporteur proposed an alternative wording for draft guideline 2.6.1, which read:

> 2.6.1 *Definition of objections to reservations*
>
> "Objection" means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the State or organization purports to prevent the reservation having any or some of its effects.[30]

16. This wording met with general approval.[31] However,

- Some members wondered whether it would not be preferable to postpone consideration of the wording until the Commission had adopted the draft guidelines on the effects of objections;
- One member stressed that no formal link should be established between the definition of objections to reservations and the effects provided for in the Vienna Conventions;[32]
- Another member expressed concern that the proposed wording would benefit the unilateral will of the objecting State to the detriment of the contractual character of treaty commitments.[33]

17. As to the first point, the Special Rapporteur is firmly persuaded that a wait-and-see attitude is not the right way to proceed. He finds it illogical to consider the effects of a legal institution without first having defined it, since to do so is a true case of "putting the cart before the horse".[34] Moreover, there can surely be little justification for treating objections differently from reservations: the Commission adopted a definition for reservations (based on the effects which the reserving State intends its unilateral statement to produce)[35] without feeling the need to delay such adoption until it had taken a position on such effects. The important point is not to prejudge the effects in question in the definition.

18. In this respect, the second objection related above is only partly convincing: the words "prevent the reservation having any or some of its effects" does not prejudge what the effects of a reservation are, nor does it refer back to the Vienna

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[30] A/CN.4/SR.2783, p. 8.

[31] See ibid., pp. 10-17; see also, for example, the statements by Guatemala (A/C.6/58/SR.19, para. 9), Japan (ibid., para. 50), Romania (ibid., para. 63), Greece (A/C.6/58/SR.20, para. 51) or the Islamic Republic of Iran (ibid., para. 70) during the discussion in the Sixth Committee.

[32] Ibid., p. 11, Mr. Gaja.

[33] Ibid., p. 12, Ms. Xue.

[34] Cf. ibid., p. 12, Mr. Mansfield. The Special Rapporteur is even more firmly persuaded that it would be inappropriate or impossible to omit a definition of the word "objection" in the Guide to Practice on the ground that article 20, paras. 4 (b) and 5, and article 21 of the Vienna Conventions suffice in that regard (cf. A/C.6/58.SR.19, para. 14, Portugal; A/C.6/58/SR.20, para. 9, United States of America; para. 67, Pakistan; against: A/C.6/58/SR.19, para. 70, Cyprus). For one thing, the provisions in question are not definitions and, for another, the Commission has consistently held that the Guide to Practice should reproduce all the elements of the Vienna Conventions, which should be further elaborated and amplified.

[35] See article 2, para. 1 (d), of the Vienna Conventions and draft guideline 1.1.

Conventions; it leaves open the question of knowing what they are, as well as the effects which the objection itself may produce. On the other hand, it is true that it does not cover every case that may occur. It is possible that the author of the objection intends to oppose the application, in its relations with the author of the reservation, not only of "the provisions to which the reservation relates",[36] but of a whole part of the treaty — although not of the treaty in its entirety —[37] even though the reservation relates only to a particular provision of that part.

19. To cover such circumstances, which correspond to actual cases,[38] it is no doubt desirable to modify the end of the proposed definition as follows: instead of providing that the objection "purports to prevent the reservation having any or some of its effects", it should be stated that it "purports to modify the effects expected of the reservation [by the author of the reservation]". The words between square brackets make the text cumbersome, and it would perhaps suffice to include this particular in the commentary.

20. As to the third critical remark on the proposed wording reproduced above,[39] the Special Rapporteur is particularly attached to the "contractual" character of treaties and to the voluntary nature of treaty commitments. This explains, incidentally, why he has consistently been reluctant to recognize any rule which would result in allowing a State to be bound against its will by any treaty provision whatever[40] and has expressed doubts about the possibility for an objecting State of maintaining that the treaty as a whole is binding upon the author of a reservation despite its reservation.[41] Here, too, the proposed wording does not prejudge in any way the effects which a reservation or an objection may produce; it is limited to taking note of the effects which the author of the objection (and, by the same token, the author of the reservation) *intend* the objection (and the reservation) to produce.[42]

21. Accordingly, these points could (and should, in the view of the Special Rapporteur) be spelled out in the commentary to draft guideline 2.6.1.

22. In the light of these observations, the guideline might be drafted as follows:

2.6.1 *Definition of objections to reservations*

"Objection" means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the

[36] As provided in article 21, para. 3, of the Vienna Conventions.

[37] As provided in article 20, para. 4 (b), and article 21, para. 3, of the Vienna Conventions when the author has expressly expressed such intention.

[38] See A/CN.4/535/Add.1, para. 95, in particular footnote 151; see also, for example, the objections of the United States of America, Japan, the Netherlands, the United Kingdom or Sweden to the Syrian reservation to the compulsory conciliation procedure provided for in the 1969 Vienna Convention and Tunisia or the Union of Soviet Socialist Republics to article 66, (*Multilateral Treaties* ..., vol. II, chap. XXIII.1, pp. 345-348).

[39] Para. 15; for the remark in question, see para. 16 above.

[40] See, for example, the second report on reservations to treaties (A/CN.4/477/Add.1, paras. 226-230); this position has, moreover, been endorsed by the Commission in para. 10 of the 1997 preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties (see *Yearbook* ... 1997, vol. II (Part Two), para. 157).

[41] See A/CN.4/535/Add.1, paras. 96-97.

[42] This last point is already included in the definition of reservations given in the Vienna Conventions and reflected in draft guideline 1.1.

State or organization purports to modify the effects expected of the reservation [by the author of the reservation].

23. As is indicated in the eighth report, there seems to be no point in including *in the definition* itself any mention of the categories of States or international organizations able to formulate an objection.[43] In this matter, it is sufficient to draw on the definition of the reservations themselves, which is without particulars as to the category of State or international organization which is entitled to formulate a reservation. This does not, of course, mean that the question should not be settled in the Guide to Practice; but it would be appropriate to address it in a separate guideline.

24. The Special Rapporteur is, moreover, aware that the word "made" in the definition ("a unilateral statement ... made by a State or an international organization") is open to discussion: taken literally, it might be understood as meaning that the objection produces effects per se without any other condition having to be met; yet, it must at least be permissible. The word "made" was chosen for reasons of symmetry, because it appears in the definition of reservations.

25. As to the other elements of the definition, they are dealt with in paragraphs 76 to 79 of the eighth report.[44]

26. Draft guideline 2.6.1 ter, which was proposed in the same document,[45] was justified only because of the reminder, in the text of draft guideline 2.6.1, of the effects of objections to reservations as stated in the Vienna Conventions. Once the reference to those provisions is dropped, the elaboration in draft guideline 2.6.1 ter is unnecessary.

27. Such is not the case with draft guideline 2.6.1 bis.[46] It was justified because of the risk of confusion arising out of the use of the word "objection" to designate the opposition of a State or an international organization to the late formulation of a reservation in draft guidelines 2.3.1 to 2.3.3.[47] In fact, these operations are intellectually distinct: the absence of *opposition* to such a formulation by no means prevents contracting States or international organizations from *objecting* to the new reservation even if this is rare in practice.

28. The only doubt entertained by the Special Rapporteur concerned the need for the formal inclusion of such a guideline in the Guide to Practice.[48] A consensus seemed to have emerged in the Commission in favour of such inclusion;[49] the draft guideline should be numbered 2.6.2. The Special Rapporteur sees no reason to modify the proposed wording, except in one respect.

29. Since the Commission adopted, at the current session, draft guideline 2.3.5 on widening of the scope of a reservation, which refers back to the question of late

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[43] See A/CN.4/535, para. 100.

[44] A/CN.4/535/Add.1. In its aforementioned communication (footnote 10), Poland is of the view that the time at which an objection can be made should be specified in this definition. For the reasons indicated in para. 76 of document A/CN.4/535/Add.1, the Special Rapporteur thinks not; but, clearly, this information should be given in another draft guideline.

[45] See para. 5 above.

[46] See para. 4 above.

[47] See A/CN.4/535/Add.1, para. 101.

[48] Ibid.

[49] See para. 10 above.

formulation of reservations,[50] it seems logical, in draft guideline 2.6.2, to address "objections" to the late widening of the scope of a reservation:

2.6.2 *Objection to the late formulation or widening of the scope of a reservation*

"Objection" may also mean the unilateral statement whereby a State or an international organization opposes the late formulation or widening of the scope of a reservation.

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[50] The text of this draft guideline reads: "2.3.5 *Widening of the scope of a reservation*: The modification of an existing reservation for the purpose of widening its scope shall be subject to the rules applicable to the late formulation of a reservation. However, if an objection is made to that modification, the initial reservation remains unchanged."